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Supreme Court of the United States

~~October Term 1905, No. 520~~

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JAMES H. McKE

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF ROCHESTER,
Defendent in Error.

In Error to the Supreme Court of the State of New York.

BRIEF IN REPLY ON BEHALF OF THE PLAINTIFF IN ERROR.

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Attorney and Counsel for Plaintiff in Error,
ROCHESTER, NEW YORK.

WILLIAM C. TRULL,
JOSEPH S. CLARK, *of Counsel.*

Supreme Court of the United States.

OCTOBER TERM, 1906. No. 156.

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ROCHESTER,
Defendant in Error.

BRIEF IN REPLY ON BEHALF OF THE PLAINTIFF IN ERROR.

There are several claims made in the brief filed by counsel for the defendant in error, to which counsel for plaintiff in error desire briefly to reply.

First: Counsel for defendant in error at pages 22 and 23 of their brief, seek to limit the meaning of the language "rights, property, privileges and franchises" used in the merger acts of the State of New York, so as to exclude immunity from taxation and cite from *Phoenix Fire & Marine Insurance Company v. State of Tennessee, 161 U. S. 174,* which is referred to in the principal brief of the plaintiff in error, and refer to the language used in Chapter 446 of the laws of the State of New York for 1876, relating to railroads sold under foreclosure and point out that the language there used was "franchises, rights, powers, privileges and immunities"; and also call attention to the fact that Chapter 917 of the Laws of the State of New York of 1869, providing for the consolidation of railroad corporation, uses the language 'rights, privileges, exemptions and fran-

chises", and then calls attention to the fact that Chapter 254 of the Laws of 1867, which was the merger act, uses the words "estate, property, rights, privileges and franchises", and does not use the word "immunities."

But it would seem that this is a rather farfetched attempt to apply the doctrine of the insurance case here. The Act of 1867 was passed two years before the consolidation act, and nine years before the act providing for the foreclosure of mortgages, by different legislatures, legislating upon different subjects. But in the case in the 161st U. S., the Legislature granted to a company certain properties, rights, privileges, immunities and franchises, and then granted to the corporation succeeding to the rights of the last corporation, rights, privileges, franchises, etc., leaving out the word 'immunities"; and in that case the omission was held to be significant, but it certainly can have no significance here. The Act, Chapter 719 of the Laws of 1869, providing for consolidation does not use the word "property", but simply "right, privileges, exemptions and franchises."

Can it be doubted that the properties passed, under these words, to the consolidated corporation?

Second: Counsel for defendant in error, under their second point, beginning at page 30 of their brief, strongly urge that the rights granted to the Rochester City & Brighton Railroad Company by the Act of 1869, were subject to the reserve power of the Legislature to alter, amend or recall. This question has perhaps been sufficiently argued in the original brief filed by the plaintiff in error. It was there pointed out, that a clear distinction exists, running through all the cases in this Court and in the New York Court of Appeals, between contract rights, property rights, granted by the Legislature, and rights obtained under the charter. In other words, "chartered rights."

If the rights claimed are given by the charter, and the Act under which the charter is obtained is subject to the right to alter, amend or repeal, and the amending or altering act does not amount to the destruction of property, the reserve power may be exercised. But in no case has this reserve power been held to apply to the destruction or emasculation of a franchise.

The two cases upon this subject in the State of New York, most exploited by counsel here on either side, are entirely reconcilible.

People v. O'Brien, 111 N. Y. 1, is a case where the Court of Appeals held that contract rights, franchise rights, property rights, could not be affected by subsequent legislation. The case cited by counsel for defendant in error, *N. Y. v. 23rd St. R. R. Co. 113 N. Y. 113*, is a case purely of chartered rights, and in no wise conflicts with the doctrine laid down in the O'Brien case.

In that case the Legislature of the State of New York, by Chapter 514 of the Laws of 1860, authorized and empowered one Roe and others and their assigns, to lay, construct, operate and use a railroad in certain streets of the City of New York.

Shortly prior to the 12th day of December, 1864, the Bleeker Street and Fulton Ferry Railroad Company was organized under the General Railroad Act of 1850, and the route of its railroad set forth in its articles comprised the streets named in the Act of 1860.

On the 12th day of December, 1864, all the rights, privileges and franchises conferred upon Roe by the Act of 1860, were assigned and transferred to this corporation.

Then, by Chapter 100 of the Laws or 1873, the railroad company was authorized to extend its tracks into other streets, and among other conditions, the legislature imposed this:

> "The said company shall pay to the corporation of the State of New York, a license fee of fifty dollars for each and every car used by them on said extensions."

In the same year, and a little more than a month later, the Legislature passed Chapter 647 of the Laws of that year, which provided that in lieu of the payment of the license fee of fifty dollars for each car, the company should pay one per cent. of its gross receipts, annually, on the first day of October, in each year.

It did not appear that the Bleeker Street Company, between the dates of the passage of the two acts, had expended a penny in constructing any extension, or had in anywise acted upon or accepted in any way the provisions of the first act. There was nothing in either act that could be construed into a promise or a representation that the license fee, or the percentage, was to be in lieu of any further imposition.

In 1875 the Legislature passed Chapter 369 of the Laws of that year which authorized any railroad company to take a lease of all or any part of the Bleeker Street road. The road was leased to the Twenty-third Street Railroad Company, which then, for the first time, claimed that the Legislature could not alter the imposition of the license fee of fifty dollars or impose a different license fee or a percentage upon gross receipts. No question was made of any contract, and the Court expressly approving the case of *People v. O'Brien*, held that the legislation must be construed as an amendment to the charter of the Bleeker Street road.

Third: Counsel for defendant in error claim, under their first point, beginning at page 12 of their brief, that the decision of the Court of Appeals that the right of exemption from making new pavements granted by the Act of 1869 to the R. C. & B. R. R. Company did not pass to the plaintiff in error under the lease and merger act, is conclusive upon this point, and does not involve a federal question.

In the first place, the prevailing opinion of the Court of Appeals did not construe the language of the merger acts. The Court simply said, in the prevailing opinion, at page 101 of the record, that the language of the Act of 1869 did not, in itself, contain any authority for the transfer, and uses this language: "The language of the statute before us is personal, not attached to the property. It enacts that said Company 'not said Company, its successors or assigns' shall not be required to pay any part of the expense of re-paving the streets." But even if the Court had elaborately considered the language of the merger acts and determined that the language was not broad enough to pass this particular benefit attached to the franchise, it would not under the doctrine laid down and adhered to by this Court in many cases, be at all conclusive upon this point.

The question here, is, whether a contract made with the Rochester City & Brighton Railroad Company and with the Rochester Railway Company as its assignee, has been violated by the provisions of the General Railroad Act of 1890, and this Court will consider and determine every question which bears upon that proposition.

We need only refer to the cases already cited and digested under point Third, page 65 of the original brief filed herein by the plaintiff in error.

But in addition to that, there are numerous other late cases in which this Court has enunciated this doctrine:

Citizens' Bank of Louisiana v. Parker, 192 U. S., 73, was a case where the question came before this Court as to whether a contract existed.

A motion was made to dismiss the writ of error on the ground that the Court had no jurisdiction, the question simply being the proper construction of the statutes of the State of Louisiana. At page 77, in his opinion, Mr. Justice McKenna, referring to this claim, said:

> "That assuming that the judgment rests upon the grounds stated, we nevertheless have the power of review. The Federal question presented is, did the Bank at the time of the imposition of the license tax sued for, have a contract with the State exempting it from such tax? The elements of that question are the original contract and all subsequent legislation relating to the contract and which it is claimed modifies or changes it. The motion to dismiss is therefore denied."

In *G. R. & I. Ry. Co. v. Osborne, 193 U. S., 17, the question was* again raised. Mr. Justice White in delivering the opinion of the Court said, at page 27:

> "The jurisdictional question which was raised by the defendant in error requires first to be disposed of. It was objected that the judgment of the Supreme Court of Michigan in the case at bar was not based upon a Federal question, and hence this Court is, it is urged, without jurisdiction to entertain this writ of error. The objection, however, is not well founded. It is plain from the averments of the answer of the railroad company to the petition in mandamus, that the Company relied upon the provisions of the General Railroad Law of 1873, authorizing the incorporation of the purchasers of a railroad after sale in the foreclosure proceedings, as constituting a contract protected by the Constitution of the United States. The determination of the alleged estoppel * * * * necessarily involves a consideration of this claim of a contract right, pro-

tected from impairment by the Constitution of the United States. In substance, if not in express terms, such question was passed upon by the Court below. A Federal question which gives this Court jurisdiction, therefore, arises on the record."

Again, in *G. S. F. P. Hotel Company v. Jones, 193 U. S., 532*, a question as to the constitutionalty of the Mechanics Lien Law of the State of Ohio came before this Court.

In that case this Court construed the statutes of the State of Ohio and cited with approval the language of Mr. Justice Bradley in *Burgess v. Seligman, 107 U. S., 20*, opinion 33.

In *C. B. & Q. Ry. Co. v. Ill., 200 U. S., 561*, where an effort was made to deprive this Court of jurisdiction on the ground that the question involved was purely one of construction of the state's statute, the head-note of the case states, aptly, the decision:

> "A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States if a Federal right or immunity was especially set up or claimed which, if recognized and enforced, would require a different judgment."

Again, in *W. C. S. R. R. Co., v. Ill. 201 U. S., 506*, Mr. Justice Harlan, delivering the opinion of the Court at page 519, says:

> "The contention of the City that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon the grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United States,—the judgment rejects the claim of the Company, specially set up in its answer, that the relief asked by the City cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving any one of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them."

In *Muhlker v. N. Y. H. R. R. Co., 197 U. S., 544,* the question in that case involved the right to easements of light, air and access to plaintiff's premises, as against the construction of an elevated railroad in the street. The various decisions of the New York Courts upon this much mooted question were reviewed in the opinion of Mr. Justice McKenna, and at page 570 he uses this language:

> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract."

In the case of *County Com. of Wicomico County v. Bancroft, 203 U. S. 112,* Mr. Justice Day, delivering the opinion of the Court said:

> "Previous decisions of this Court have settled the proposition that whether such exemption has been in fact repealed by a subsequent state statute is a question of a state law, in which the decisions of the highest courts of the state, *in the absence of a contract* are binding; and that it is only where the exemption is irrepealable thus constituting a contract, that it becomes the duty of this Court to decide for itself whether the subsequent act did or did not impair the obligation of the contract."

And it was distinctly held in fact conceded in that case that there was no contract.

The case is on-all-four's with the situation that the case of *Conway v. The City of Rochester* would have been in, had the City of Rochester sued out a writ of error to review the decision of the Court of Appeals in that case. The construction of the Court of Appeals in that case, that the General Railroad Act of 1890 repealed the exemption clause, and the Act of 1869 would have been conclusive here and the writ would have been dismissed, for the reason that there was no constitutional question urged or raised, and no one before the Court who could raise it, but now the plaintiff in error comes into court urging that the Act of 1869 was a contract with

it, and that the contract clause of the Constitution protects it.

In a late case, decided by this Court, and not yet reported, *F. H. & W. R. R. Co. v. City of New Haven*, decided December 3rd, 1906, the question arose as to the validity of an assessment against the plaintiff in error. This Court in an opinion by Mr. Justice McKenna, ruled against the contention of the plaintiff in error, but examined the question upon the merits, and the Court used this language:

> "So deciding betweeen the statutes, the Court adjudged that the Act of 1895 was constitutional, on the ground that it was a proper exercise of the police power of the state, and on the ground that the Act was an exercise of the power reserved by the state of altering, amending or repealing the charter of the railway company. If either ground is tenable the judgment must be affirmed. We will place our decision on the second ground, as being of more local character, and because the exercise of the power expressed only comes under our review in its excess. We accept the decision of the Supreme Court of Errors, that the statutes were intended as an exercise of the power of amendment reserved by the State, although plaintiff in error contends that such was not their intention."

The Court then, after citing several Connecticut cases, continued:

> "Was such an amendment in excess of the power of the state? The limitation upon the power of amendment of charters of corporations has been defined by this Court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the Legislature may deem necessary to secure, either the object of the grant or any other public right not expressly granted away by the charter. In another case it was said that the 'alterations must be reasonable; that they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment and alteration.'"

The Court then cites many cases in this Court holding this doctrine.

Within the authority of this and the cases cited, it might be said here, that even conceding what is not claimed by the counsel for defendant in error, and what has never been claimed, that the Act of 1869 was an amendment to the charter of the R. C. & B. R. R. Co., and that the Railroad Act of 1890 must be construed as a further amendment, that under the circumstances of this case and in view of the practical construction placed upon these acts, the amount of moneys expended by the original grantee and by the plaintiff in error upon the faith of the Act, such an amendment would be within the condemnation of this Court, as unreasonable, and confiscatory in its effects.

But there is no need for the plaintiff in error to invoke that rule, for clearly none of these acts were amendments to the charter of the Rochester City & B. R. R. Company and the Court of Appeals so held.

> "But the act of 1869 neither amends or assumes to amend the charter of the Company."

Per Cullen, Ch. J., Record page 99.

Fourth: It is strongly urged in the brief of counsel for the defendant in error, that the passage of the General Railroad Act of 1890, of some of the provisions of which we complain as impairing the obligation of a contract, was an exercise of the taxing power of the state. It would seem that this contention has already been sufficiently answered in the original brief filed herein by the plaintiff in error. Whatever may be said of the imposition of the liability to make new pavements upon railroads constructing their road under the provisions of the General Railroad Act, or upon that portion of the railroad of such company extended under the provisions of the Railroad Act, it is very clear that the imposition, arbitrarily, of this duty, upon that portion of the tracks of a railroad company, organized and constructing its tracks long prior to the passage of any of the General Railroad Acts, is not an exercise of the taxing power, but a gross discrimination and attempt to impose an absolute burden, without any referee whatever to equality or any reference whatever to

any benefit to the property upon which the burden is imposed. The Court of Appeals of the State of New York in *People ex rel. Davidson v. Gilon, 126 N. Y. 156, 157*, doubted whether an assessment or charge for a local improvement for paving the streets upon a road operated by horse power was justified, under any rule of taxation. Clearly such an imposition upon a railroad operated by electricity, which makes no use whatever of the pavement, is not based upon a theory of benefit to the property against which the assessment is made, or the arbitrary charge levied.

The Statute provides for no notice whatever to the railroad company upon the question as to whether the improvement shall be undertaken. It provides for no notice whatever to the railroad company of any hearing as to the amount of the assessment, but arbitrarily fixes it at the cost of whatever pavement may be selected by the city authorities, no matter how expensive, between the rails, the tracks, and two feet outside of the tracks. Such notice is, by the charter of the City of Rochester, all of the germane provisions of which are set out in the answer and which charter is a public act and was in evidence upon the trial, provides for notice of all these matters to every other property owner and an opportunity to be heard.

Viewed as an exercise of the power of taxation, the statute would be void in its application to the plaintiff in error, within the meaning of the Fourteenth Amendment to the Federal Constitution.

Fifth: With reference to the questions discussed under the Fifth point in the brief filed by counsel for defendant in error, when the original brief was filed by counsel for plaintiff in error, it was thought that these questions were disposed of by the decision of the Supreme Court of the State of New York which was not disturbed in any way by the decision of the Court of Appeals.

But in view of some of the later cases cited in this brief in reply, it has occurred to counsel that possibly this Court may rule that in determining whether contract rights of the plaintiff in error have been violated by the legislation in question, it will, for itself, determine, as a part of that question, whether those contract rights, if they existed, have been waived by the plaintiff in error by virtue of the extensions made by its predecessor under the General Railroad

Act of 1884 and by it under the General Railroad Act of 1890, or by the contract of 1894. Upon these questions, therefore, counsel for plaintiff in error beg leave herewith to print, as a part of this brief, their argument before the Court of Appeals when those questions were before that Court, and which the majority of the Court evidently omitted to pass upon. Those points were discussed as follows:

POINTS.

II.

THE VARIOUS EXTENSIONS MADE BY THE ROCHESTER CITY & BRIGHTON RAILROAD COMPANY OF ITS RAILROAD, UNDER THE GENERAL RAILROAD ACT, CHAPTER 252 OF THE LAWS OF 1884, DID NOT AMOUNT TO A WAIVER OF ITS RIGHTS UNDER THE ORDINANCES, AND CHAPTER 34 OF THE LAWS OF 1869.

By the 24th finding of fact, found at page 73 of the record, it appears that after the passage of the General Railroad Act of 1884, the Rochester City and Brighton Railroad Company obtained from the municipal authorities of the city of Rochester, various consents to extend its track and railroad into various streets of the city of Rochester, and these consents were from time to time granted and each contained the condition provided for by the statute of 1884,

> "upon the express condition that the provisions of chapter 252 of the Laws of 1884, pertinent thereto shall be complied with."

It is seriously urged by the appellant's counsel, that the application for these various extensions and the acceptance of the grant of such extensions by the Rochester City and Brighton Railroad Company, amounted to an agreement upon its part to waive all of the privileges and exemptions to which it was entitled under the Act of 1869 and to bring its whole road under the provisions of section 9 of the Act of 1884. This certainly would be a most extraordinary result and before it is judicially determined that such a result neces-

sarily attended the making of extensions under the Act of 1884, that act should be most carefully examined.

A careful study of chapter 252 of the Laws of 1884 will show that it was passed for the purpose of encouraging the construction of street railroads in the State of New York, and directly to encourage the extension of existing street railroads, and all of the provisions of the act which impose burdens upon street railroads are carefully drawn, so as to distinctly provide, that as to all railroads organized under the Act itself, and constructing their roads under the provisions of the Act itself, the burdens apply to the whole road and as to all existing street railroads constructing branches or extensions under the provisions of the Act, the burdens are made to apply only to that portion of the existing street railroad embraced in the branches or extensions constructed under the provisions of the Act.

A careful study of the whole Act will show that it was never intended to discourage the extension of an existing road, by providing that if it extended its road one rod under the provisions of the Act, that then all the burdens of the Act should fall upon not only the extension itself, but all of the existing system constructed under charters and franchises, which for years had exempted it from any of these burdens. It is plain to be seen that such a construction would have discouraged, upon the part of existing railroads, any attempt to extend their lines one inch.

Take the case of the Rochester City and Brighton Road, which had practically at the time of the passage of the Act of 1884, gridironed the city of Rochester with its tracks, possessing as to all its existing tracks franchises which exempted it from paying any percentage of its gross receipts to the city, which exempted it from any burden of paying for new pavement in any of the streets in which its rails were laid. The contention is that if it availed itself of the Act of 1884 to extend its road a rod that operated *eo instanti* to wipe out all its franchises and bring its entire system under and subject to all the burdens of the Act of 1884.

It is insisted that such a construction was never contemplated by the Legislature. No such practical construction has even been put upon the Act by any city in the State of New York. Aside from the results that would follow from such a construction, in the dwarfing

of all enterprises to extend existing roads, the Act itself is so carefully drawn that it does not admit of any such construction. The first section of the Act provides for the incorporation of new companies.

The last sentence of the section applies to existing railroads in the following language:

> "No existing street surface railroad company shall extend its line or construct any branch thereof under this Act, until it has made and filed with the Secretary of State a certificate,"

Section 3 of the Act provides as follows:

> "Any company organized as aforesaid, or any existing street surface railroad company or corporation heretofore organized for the purpose of building and operating a street railroad, may construct, maintain, operate, use and extend a railroad or branch, on the surface of the soil,"

Then follow the provisions for obtaining a consent of the local authorities and the consent of the property owners. Under the provisions of section 7,

> "The local authorities of any incorporated city or village to whom application under the provisions of this Act may be made for consent to the construction, maintenance, use, operation or extension of a street surface railroad upon any street, road, avenue or highway, may at their option provide for the sale of and sell at public auction the franchise, subject to all the provisions of this Act to so construct, maintain, use, operate or *extend* such street surface railway."

Then follow provisions regulating the manner of sale. Clearly the thing that is sold is the franchise to build the railway, or an extension of an existing railway, and in either case the thing bought is the franchise to construct a railroad in certain streets, or to extend an existing railroad into certain streets. By section 8, it was provided as follows:

> "Every corporation incorporated under or constructing or operating a railroad constructed or *extended* under the provi-

sions of this Act, within the cities of this State, having a population of two hundred and fifty thousand or more * * * shall for and during the first five years * * * pay into the treasury * * * 3 per cent of its gross receipts."

Then follows this other significant provision showing the purpose of the Legislature not to extend this to the whole receipts of existing road,

"provided, however, that every corporation now existing and operating a street surface railway which shall extend its tracks or construct branches therefrom and operate such extentions or branches under the provisions of this Act * * * shall pay such percentages as aforesaid only, upon such portion of its gross receipts, as shall bear the same proportion to the whole value thereof, as the length of such extension and branches shall bear to the entire length of its tracks."

It is further provided in the same section that in other cities and villages the municipal authorities *might* require the payment of 3 per cent of the gross receipts, the amount thereof to be determined in proportion to the length which the *extension* constructed bore to the whole line.

A similar provision is found in section 13, fixing the rate of fare as follows:

"No company or corporation, incorporated under or constructing and operating a railroad under the provisions of this Act, shall charge any passenger more than five cents for one continuous ride. * * * This section shall not be construed to apply to any part of any road heretofore constructed and now in operation, unless such company shall acquire the right to extend such road or to construct branches thereof, under the provisions of this Act, in which event its rate of fare shall not exceed its authorized rates prior to such extension."

Section 9, the provision in question, imposing a burden, is in the language following:

"Every such corporation incorporated under, or constructing, extending or operating a railroad constructed or *extended* under the provisions of this Act * * * shall also whenever and as required, and under the supervision of the proper local au-

> thorities, have and keep in permanent repair that portion of every street and avenue between its tracks, the rails of its tracks and a space two feet in width outside and adjoining the outside rail of its track, or tracks, so long as it shall continue to use *such* tracks *so constructed under the provisions of this Act.*"

The question arises, taking the whole Act together, its apparent purpose to encourage, not only the building of new railroads, but the extension and betterment of existing railroads, whether the meaning of this section is, that if an existing railroad, constructed and in operation prior to the passage of the Act and having mileage of a hundred miles, extended its road under the provisions of this Act, assumed the burden of paving with new pavement between the tracks and the rails of its tracks and two feet outside, in all the streets in which it had constructed and was maintaining a railroad, or whether it means, that so long as it so continued to use such tracks, so constructed under the provisions of this Act, its liability is confined, under section 9, to paving in that street or those streets, in which it extended and constructed its line under the provisons of the Act of 1884.

It would seem that the language is susceptible of no other construction than the one contended for by the defendant here. The construction contended for by the plaintiff would do violence, not only to the evident purpose of the Act, but would do violence, to its language, and make the burden imposed by section 9, far different in extent from any of the burdens imposed by any of the other sections to which attention has been called. The language of the whole Act is satisfied by the construction contended for here, that the burden imposed by section 9, upon an existing street railroad was to compel it to pave only in those streets in which it extended or constructed branches under the provisions of the Act, leaving to its charter and its existing franchises, the question as to its liability to repair or repave the streets in which its tracks were already constructed.

Assuming the construction here contended for to be the true construction of section 9 of the Act of 1884, then when the Rochester City & Brighton Company obtained leave under its provisions to extend its tracks in certain streets and accepted the benefit of such

provisions, it may be said that it also assumed all the burdens imposed by the other provisions of the Act, and exactly what those burdens were is apparent from the construction of the Act itself contended for. It evidently agreed, when it availed itself of this privilege, to pave between the tracks, the rails of its tracks, and two feet outside, in all those streets in which it had extended its road or constructed branches under the provisions of the Act of 1884, but not in any of those streets in which it had obtained its franchise, had constructed and was operating a railroad prior to the passage of the Act of 1884.

Upon the question of the practical construction placed by the city of Rochester upon the Act of 1884, I call the attention of the court to the ordinance of the Common Council which appears in finding of fact number eleven, passed on the 29th day of March, 1887, in which section 2, in relation to repairing pavements, was amended and which provided that in the streets and avenues where the railroad track was laid prior to May 6, 1884, the company should repair the pavement between its tracks and the rails of its tracks.

This was in exact accordance with the ordinance of January 12, 1869, and chapter 34 of the Laws of 1869, and the ordinance further provided that in all extensions or branches of the railroad constructed since the 6th day of May, 1884, the repairs should be made between the track, the rails of the tracks and for a space of two feet in width outside of and adjoining the outside rails of the track, in direct accordance with the construction here contended for of section 9 of the Railroad Act of 1884; that it applied only to the streets in which extensions were built under the Act of 1884 itself. This was the common sense construction, the construction contended for and laid down by the then corporation counsel and the one that has been followed in all the cities of the state, and satisfies the condition imposed by the Act, that its provisions "pertinent" to the exension granted, only, shall be complied with.

Particularly is this construction made clear by the language of section 4 of chapter 252 of the Laws of 1884, prescribing the conditions which the Common Council shall annex to its consent to the *construction or the extension* of a railroad in any of the streets of the city. That section provides that the consent of the Common

Council shall contain the express provision, that the franchise for the extension is granted upon condition that the railroad company shall comply with "the provisions of this Act *pertinent thereto.*" The provisions of the Act which are to be complied with are only those which are pertinent to the whole railroad if an entire railroad is constructed under the act, or to the extension alone if only an extension is asked for and granted.

In this connection it is well to state that the Court of Appeals of the State of New York in the *Matter of 3rd Avenue R. R. Co. 121 N. Y. 536*, determined what was the meaning of the word "construction" of a railroad, and there held that the construction of a street railroad meant the obtaining of the franchise and the construction of an original railroad in the street and that the taking up of the ties and rails of an old company and replacing them with new, was not a construction of a railroad, and that the changing of motive power from horse to electricity, even although it involved the entire rebuilding of the road, from the foundation to rail, was not a construction within the meaning of the railroad statute. There was therefore no construction of any railroad by the Rochester C. & B. R. R. Company or the plaintiff in error, under the Railroad Act of 1884, or that of 1890, excepting in the streets in which *it was extended* under the provisions of that act.

As bearing upon the construction herein placed upon the provisions of Chapter 252 of the Laws of 1884 of the State of New York, attention is called to Section 18 of that Act, known as the saving clause, as follows:

> "All acts and parts of acts whether general or special, inconsistent with this Act are hereby repealed. But nothing in this Act shall * * * interfere with or repeal or invalidate any rights heretofore acquired under the Laws of this State, by any horse railroad company, or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road, in accordance with the terms and provisions of its charter * * "

II.

THE ACT OF THE PLAINTIFF IN ERROR IN APPLYING FOR AND OBTAINING EXTENSIONS OF ITS RAILROAD, AND OF THAT OF THE ROCHESTER CITY & BRIGHTON RAILROAD, LEASED TO AND MERGED BY IT, UNDER THE PROVISIONS OF THE GENERAL RAILROAD ACTS OF 1890, 1892 AND THE SEVERAL ACTS AMENDATORY THEREOF, DID NOT OPERATE AS A WAIVER OF ITS RIGHTS IN THE RAILROAD OF THE ROCHESTER CITY & BRIGHTON RAILROAD COMPANY, GIVEN BY CHAPTER 34 OF THE LAWS OF 1869, NOR MAKE THE WHOLE OF ITS RAILROAD SUBJECT TO THE PROVISIONS OF SECTION 98 OF THE RAILROAD LAW.

It appears by the twenty-fourth finding of fact (Record page 46) that after the lease of the Rochester City & Brighton Railroad Company of its property and franchises to the defendant, and the merger, the defendant from time to time applied to the municipal authorities of the city of Rochester for leave to extend its lines, under the provisions of the Railroad Law, and such extensions were granted and accepted subject to the conditions imposed by the Railroad Law as follows:

> "That the foregoing consent is given upon the following conditions expressly, to wit: that the provisions of article 4 of the Railroad Law pertinent thereto, shall be complied with. That this consent shall be filed in the office of the Clerk of the County of Monroe."

The mere fact that the Rochester Railway Company was incorporated under the provisions of chapter 252 of the Laws of 1884, did not bring it within the provisions of that Act so far as section 9, or the paving clause, was concerned, as to those streets in which the Rochester City & Brighton road had constructd its tracks, because by virtue of its lease of all the property and franchises of that road, it was admitted to operate a railroad in those streets by virtue of the Charter and franchises of the Brighton Railroad, and not by virtue of the Act of 1884. This was settled by the court of appeals. (*Gilmore v. City of Utica, 121 N. Y. 561.* See opinion, *572, 573.*)

But following the Act of 1884 came the General Railroad Act of 1890, which took effect on the 1st day of May, 1891. Section 90 of that Act was as follows:

> "A corporation organized for the purpose of building and operating or extending a street railroad, or any of its branches, for public use in the conveyance of persons and property in cars, for compensation, upon and along * * * must comply with the provisions of this article."

In 1892, section 90 was amended so as to provide as follows:

> "A corporation organized since May 6, 1884, for the purpose of building and operating, or extending, a street surface railroad, or any of its branches, for public use * * * must comply with the provisions of this article."

In 1893, section 90, by the provisions of chapter 434 of the Laws of that year, was amended so as to read as follows:

> "The provisions of this article shall apply to every corporation which, under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street surface railroad or any extension, or extensions, branch, or branches, thereof for public use * * * must comply with the provisions of this article."

By chapter 933 of the Laws of 1895, section 90 was again amended but not so as to affect this portion of the section, the portion quoted being re-enacted, excepting it was made more grammatical.

The decision of the court of appeals in the *Conway Case* was doubtless predicated upon the sweeping language of section 90, which the court will readily see, as amended in 1893, applied to every street surface railroad corporation, no matter when it obtained its charter and no matter when it obtained its franchises, or whether they existed by contract or not. It is believed by counsel for the plaintiff in error, that if the court's attention had been called to the very broad saving clauses, in both the Act of 1884 and in the several railroad acts, and in view of its subsequent decision in *Parker v. E. C. & W. R. R. C.* 165 *N. Y.* 274, it would have arrived at a different conclusion. But

the railway company was not represented upon that argument, and had nothing to do with the litigation.

So far in this argument it has been assumed, that the provisions of the Railroad Act as construed by the highest court in this state, violate the obligation of the contract between the city of Rochester and the Rochester City & Brighton Railroad, and the Act is, therefore, unconstitutional and void in its application here, and the further question arises, whether these statutory conditions which have been inserted in every franchise granted to the Rochester Railway Company since the passage of the General Railroad Law of 1890, and the acceptance of such conditions by the plaintiff in error, constitute a waiver upon the part of the defendant of its right to question the constitutionality of the General Railroad Act, and amount really to a contract upon its part, to waive the constitutional quesion, in consideration of the additional franchise granted to it in the several streets into which it has extended its lines since 1890.

It will be observed that this condition, which first appeared in the Act of 1884, is a mandatory one. In other words it is inserted in each franchise granted in every city or village, by express command of the statute and the same language appears in the Act of 1884, and in section 92 of the Railroad Law, ever since the revision in the year 1890.

What would have been the effect if the language of the statute had been and the conditions inserted in accordance with such language had been as follows:

> "That the foregoing consent is given upon the following conditions expressly, to wit, that the provisions of artcle IV of the Railroad Law shall be complied with,"

it is hardly necessary to inquire. It might have been susceptible of the construction, that the acceptance of such a franchise by the railroad company, would have been an agreement upon its part to comply, as to its whole road, with all the conditions imposed by article IV.

But the language of the statute always has been and now is, that the provisions quoted in article IV of the Railroad Law *pertinent thereto,* shall be complied with.

It is very plain that the thing applied for in each instance is not a franchise to construct the whole road, but is a franchise to extend an existing road into a particular street or streets, and the words "such consent" clearly referred to the consent of the municipality to the extension of an existing road into certain streets. That is all that is asked for; that is all that is granted.

When the condition is imposed by the statute and by the consent itself following the statute, the words "pertinent thereto" clearly refer to the franchise for the extension and to nothing else. The things in the Railroad Law that are pertinent to the particular extension are the certificate to be filed in the office of the Secretary of State, naming the streets, or parts of streets, into which the extension is sought to be made, the consent of the property owners owning property abutting on the particular streets or parts of streets into which the extension is sought to be built, the sale of the particular franchise at auction, if in a city where a sale at auction is required, and the complying with the provisions of the statute as to such extension, the percentage of gross receipts required by the statute if the extension is in a city such as described in section 95, and the payment of such percentage, based upon such proportion to the gross receipts of the road as the length of the extension bears to the entire length of the road, the rate of fare as prescribed by section 101, wherein the rights of the company, as to its existing lines, are carefully preserved and the provisions of section 98, governing the paving of streets, so far as it is pertinent to the extension itself.

It is impossible to give any reason for the use of the words "pertinent thereto," unless it be assumed that the Legislature intended that the conditions should be that the company asking and accepting the franchise should take that franchise and construct and operate the extension, subject to all of the provisions of the Railroad Act bearing upon the extension itself.

If the Legislature had intended that wherever a railroad was extended a rod, that its existing system should become subject to all the burdens of the Railroad Act, although its original charter and franchise exempted it from any such burdens, the Legislature would not have inserted the words "pertinent thereto," but would have left them out and compelled the railroad company to have agreed to sub-

ject its whole system to the burdens of the railroad act, in consideration of the bestowal of the franchise.

But as shown in a former part of this brief, this was not the policy of the Act of 1884, nor was it the policy of the General Railroad Acts following, which are all based upon the lines of the Act of 1884 and following it generally throughout with amendments, which experience has suggested from time to time.

If, therefore, the defendant is right in its contention that the application of the provisions of the General Railroad Act to those streets in which the Rochester City & Brighton Railway Company had constructed its road prior to the passage of Chapter 252 of the Laws of 1884, by force of the language of the Act itself, renders the Act unconstitutional and void, then it cannot be said that its agreement to accept a franchise for extensions of its existing line upon condition that it comply with all the provisions of the Railroad Act pertinent to the franchise for such extensions, is an agreement upon its part to waive the constitutional question and assume all of the burdens of the General Railroad Act, as to the whole of its road no matter when or under what contract it was originally constructed.

As bearing upon the construction herein given to the provisions of the General Railroad Act of 1890, attention is called to Section 181 of that Act known as the saving clause, as follows:

> "The repeal of a law or any part of it, specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred, prior to May 1st, 1891, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such a law had not been repealed. * * *"

Annexed to this Act was a schedule of laws repealed. Chapter 34 of the Laws of 1869 is not among them.

In 1892 the Legislature of the State of New York, on the 18th day of May, passed Chapter 676 of the Laws of that year known as the Act to Amend the Railroad Law. By the first section of that Act, Section 109, and Sections 180 to 183, both inclusive, of the Railroad Act of 1890, were repealed.

On the same day the Legislature of the State of New York passed Chapter 677 of the Laws of that year known as the Statutory Construction Law. Section 31 of that Act provided as follows:

> "The repeal hereafter, or by this chapter of any provision of a statute which amends a provision of a prior statute, does not revive such prior provision. The repeal hereafter or by this chapter of any provision of a statute, which amends the provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended. The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect. But the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not been effected. * * * *"

Annexed to this Act was a list of statutes specifically repealed. Chapter 34 of the Laws of 1869 is not among them, nor has there ever been any specific repeal of any provision of that statute. It will be observed that the Legislature took out of the Railroad Law, as such, the saving clause and enacted it in a general statute which applied to all the laws of the state.

III.

THE PETITION BY THE PLAINTIFF IN ERROR TO THE COMMON COUNCIL OF THE CITY OF ROCHESTER FOR CONFIRMATION OF THE LOCATION OF ITS TRACKS, AND THE EXECUTION BY IT OF THE AGREEMENT OF THE 31ST OF DECEMBER, 1894, AND THE ORDINANCE OF THAT DATE, DID NOT AMOUNT TO AN AGREEMENT BY IT TO WAIVE THE CONSTITUTIONAL PROTECTION OF ITS RIGHTS UNDER THE ACT, CHAPTER 34 OF THE LAWS OF 1869.

It appears by the twenty-fifth finding, (Record, page 47) that on the 11th day of December, 1894, the defendant presented to the city of Rochester its petition, setting forth, the location of the tracks

of the several railroad companies, whose rights and franchises the defendant had acquired, and setting forth that the exact location of the tracks in the several streets as they then existed has not been fixed with due formality, and setting forth that the location of many of the tracks between the curb and the sidewalk instead of the middle of the street, or rather the right to such location, was not a matter of record, and the proof of such right in case a question should be raised, would be a tedious and expensive process, and finally praying that by a formal resolution, the location of the tracks, poles, wires and appurtenances, *as located and constructed,* should be approved, then in the petition followed a description of the location of all the tracks, poles and wires in each street, wherein any of the Railroad companies, whose rights had been obtained by the defendant, or the defendant had constructed and maintained tracks, and in the description of such streets were included the two streets in question here, North St. Paul street and Park avenue.

It further appears that the Common Council of the city of Rochester, on the 31st day of December, 1894, passed an ordinance, confirming the location of such tracks upon certain conditions therein stated, and requiring the defendant to enter into a contract in accordance with the resolutions and on the 31st day of December, 1894, the Rochester Railway Company did execute such a contract, which recited all of the resolutions and contained a provision indemnifying the city of Rochester against all suits, actions and proceedings, as provided in the agreement of February 25, 1890.

The resolutions appear in the Finding annexed to the contract. They recited the application, that a time and place was fixed for its consideration and notice published according to law, and that all persons appearing were heard and then confirmed the location of the railroad and tracks of the Rochester Railway as now operated and used by the company in the streets, avenues and highways, upon certain conditions. The first condition was as follows:

> "First. That the provisions of article IV. of the Railroad Law of the State of New York, being the Act in relation to railroads, constituting chapter 39 of the General Laws of the State of New York, be complied with."

It next provided for the transportation of policemen in uniform and of members of the paid fire department of the city of Rochester upon the cars of the defendant without charge. The fourth provision or condition of the resolution, is as follows:

> "Fourth. That all of the provisions of any agreement between the city of Rochester and *any street railroad company,* and all ordinances, resolutions, grants and consents heretofore passed by said city with reference to the construction, maintenance or operation of street railroads within said city, shall remain in full and binding force and these resolutions shall not be construed *as extending* or *affecting* the franchise of any such company, or the time of the expiration of any such franchise, or the moneys required to be paid to said city by such company, or as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company."

It is apparent from the resolutions, that the application of the Rochester Railway for the confirmation of the location of its tracks, was treated by the city authorities as an application for a franchise and all of the formalities prescribed by the Railroad Act were complied with. But it is respectfully suggested, that the resolution did not grant any franchise within the meaning of the Railroad Act, nor was any franchise asked for. The whole proceeding was upon the assumption that the franchises already were in existence and the railway company was in the enjoyment of them.

The presumption of law was, that inasmuch as the tracks of the company were in each of the streets and its railroad in operation, that the railroad was there regularly, lawfully and in accordance with a franchise duly granted, and the application was for formal resolution ratifying and confirming the defendant's right to the location of its tracks already laid by virtue of the franchises which it already possessed, and for the purpose of making a tangible record of such location of tracks under franchises which were concededly already in existence and which had already been granted. The fact that the corporation counsel in drawing the resolutions assumed that the application was for a franchise and that it required all the formalities prescribed by the Railroad Act, does not alter the situation, that no franchise was asked for and none was granted.

The fact that the petition was not an application for, nor the contract and ordinance a grant of, a franchise, is made clear by an examination of the provisions of the Railroad Law. Section 2, which provides for the incorporation of a railroad company, in subdivision 11, specifies that if the company is to be a street surface railway the articles shall contain the names and description of the streets, avenues and highways in which the road is to be constructed. Section 90, provides, that any street surface railroad proposing to extend its road or to construct branches thereof, may from time to time file in the office in which its certificate is filed, a statement of the names and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches.

Section 91 then provides as follows:

> "A street surface railroad or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing etc."

Then follows the requirements for the consent of the majority of the property owners and the consent of the local authorities, to be first obtained. Section 92 provides that the application for the consent of the local authorities shall be made in writing and provides for public notice to be given before the application is granted and then section 92 provides,

> "Such consent must be upon the express condition that the provisions of this article pertinent thereto shall be complied with, etc."

These sections, therefore, relate only to an application for a franchise to construct a street surface railroad or an extension or a branch thereof. The petition in question did not ask for permission to construct a railroad or an extension or a branch thereof. It assumed that that consent had already been given, and the road was constructed and in operation in the various streets mentioned. The petition did not assume that the consent of any property owners was to be asked to the confirmation of the location of its tracks, but it appears affimatively therein that a consent of the

property owners had been obtained at the time that the franchises were granted and the road constructed in the particular location in such streets, to wit: either upon the sides between the curb and the sidewalk, in the center of the street, or upon one side or the other of the center and in the traveled part.

It was entirely competent for the local authorities, when the franchises had originally been granted, to specifically provide for the location of the track in the particular street in which the franchise was granted, or the local authorities could leave the location of the track to the executive officers, and in the city of Rochester that was the executive board, and the particular location of the tracks was a matter of detail and of regulation, but the right to operate the road at all in the street, or to construct it therein, was the subject of a grant and was in and of itself a franchise.

It appears upon the face of the petition, that the road was in operation in all of these streets with the consent of the local authorities, and with the consent of the property owners originally given. The only matter which was in doubt and which was to be made certain, was the particular location of the track in the street itself and the records, as appears by the petition, failed to show specific authority in many of the streets, from the Common Council or the Executive Board for the particular location adopted, and it was that omission which the petition sought to cure, it was that omission which the ordinance and the contract were aimed to cure.

The contract then, in connection with the ordinance, must be construed not as the grant of a franchise requiring the insertion of certain conditions fixed by section 92 of the Statute, but a simple agreement between the railroad company and the city, and in that agreement the intention of the parties must be sought from an examination of its whole context.

It is very plain that the draftsman of the ordinance in drafting the first condition, prescribing that the provisions in article 4 of the Railroad Law must be complied with, had in mind the requirements of the statute as to the condition that should be placed in a consent, grant and franchise and inadvertently left out the words "pertinent thereto," and if the contract and ordinance amounted to the grant of a franchise, the court in obedience to the mandate of the statute,

would unquestionably read into this condition these words which were evidently inadvertently omitted by the draftsman.

But inasmuch as it is not, as heretofore shown, the grant of a franchise but a simple contract between the parties, competent to make it, these words contained in this condition must be construed in connection with the provisions of the fourth condition contained in the agreement, which has already been cited in full. If the two conditions are absolutely in conflict, then the intention of the parties must be sought by a study of the whole context, and it follows necessarily, that the condition that all of the provisions of article four of the Railroad Law should be complied with, must be construed to mean that they must be complied with only so far as they shall not affect, alter or add to any previous contract existing between the parties.

Any other construction would render the fourth condition absolutely nugatory and meaningless. The fourth condition so plainly evidences the intention of the parties that we cannot go astray in its construction. The words are "and these resolutions shall not be construed as *extending or affecting* the franchise of any such company, or changing or modifying the terms of any agreement," the words "such company," referring, as shown by the previous context, to any street railroad company, with which the city of Rochester had theretofore made any agreement, or granted to ,any consents or franchises.

The counsel for the defendant in error, at page 62 of his brief, quotes the following and cites certain authorities to sustain it:

> "It is a well settled rule of construction of contracts and statutes, that special provisions will not be held to be limited or modified by general provisions later appearing, and that the particular provision will be construed as an exception to the general provision. *Wormser v. Brown, 149 N. Y. 165, 170.*"

Counsel for the plaintiff in error does not quarrel at all with this rule of law and it may be supplemented by saying, that it is equally a well settled rule of construction that general provisions in a contract will be deemed to be limited and modified by special provisions later appearing and that the particular provisions will be construed as an exception to the general provision.

Taking the contract of 1894 as it reads, the provision first appearing that all the provisions of Article 4 of the Railroad Law must be complied with, is in and of itself a general provision stated in the most general language. There are any number of burdens imposed upon street railroad companies by Article 4 of the General Railroad Act, and the general language would seem to mean that all of them were to be complied with were it not for the specific provision in the contract following, which has just been quoted. All the provisions of Article 4 of the Railroad Law shall be complied with except that these resolutions shall not be construed as *extending* or *affecting* the frachise of any such company, or changing or modifying the terms of any agreement.

This was a special provision put into the contract so as to except from the sweeping clause that all of the provisions of Article 4 of the Railroad Law must be complied with, the particular agreement in regard to paving, legalized by the act of 1869.

Perhaps there was also another exception which would be well to make clear. The provisions of the Railroad Law, Section 101, permitted the plaintiff in error to charge any passenger five cents for a continuous ride from any point in its road to any other point.

It was bound by its contract, under the act of 1869, to charge children under five years of age nothing and children between five and twelve years of age only three cents. This provision of Article 4 of the Railroad Law was clearly excepted by this specific clause in the agreement from the general clause.

There were other general provisions in Article 4 which were excepted by the particular clause.

There is, therefore, nothing in these resolutions or in the contract of the plaintiff in error accepting them, which can be held, when the whole ordinance and contract are carefully examined, to evince an intention upon the part of either of the contracting parties, that any of the existing rights of plaintiff in error or any of the city's existing rights, should be in any manner affected by the resolutions or the contract accepting the same. But the intention is clear upon the part of both, that they should remain entirely unaffected and unimpaired, and there should be imposed upon the railroad company, as a consideration for the confirmation of the location of defendant's tracks, the additional burdens in the way of carrying

free of charge various of the city's officials and employees.

But if it should be assumed that the petition of the railroad company was an application for a franchise under article 4 of the Railroad Law, and the ordinance was the grant of such a franchise and the contract the acceptance of the same, then it is submitted that the ordinance and contract amounted to a confirmation of the provisions of the Act of 1869.

It appears by the ordinance annexed to the contract of the defendant, set out in the twenty-fifth finding of fact, that the Common Council saw fit to require the railroad company, in addition to the burdens already imposed upon it, to carry free not more than two policemen at a time upon each of the cars of the defendant and also to issue certain tickets to certain members of the detective force and to carry free of charge not more than two firemen at a time upon each of the cars of the company, and then the city by the forth subdivision of the ordinance, which was a part of the contract, and which is found at page 82 of the record, expressly provided that

> "all ordinances, resolutions, grants and consents heretofore passed by said city with reference to the erection, maintenance or operation of street railroads within said city, shall remain in full and binding force,"

and further that the ordinance shall not be considered

> "as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company."

And upon this question we say that the city and the railroad company not only refrained expressly from changing or modifying in any manner the previous agreement, but expressly confirmed it in all respects, and the city expressly confirmed it for a new and valuable consideration, moving to it from the railroad company, namely, the carrying of policemen, detectives and firemen free. And furthermore, this contract was made, this ordinance passed requiring it to be accepted by a binding contract upon the part of the railroad company, which was duly made and delivered and approved by the proper city officials, at a time when the General Railroad Act of

1892 was in full force and effect and under the General Railroad Act of 1899, the city of Rochester had full and ample power delegated to it by the Legislature to make in the granting of a franchise any contract with any railroad company which it saw fit, binding both for any length of time which it choose to specify.

People v. Barnard, 110 N. Y. 548.

In that case, speaking of chapter 642 of the Laws of 1886, known as the Cantor Act, which was subsequently incorporated in full in the General Railroad Act, Judge Earl, delivering the opinion of the court, at page 553, says:

> "Under this act and under the constitutional provisions applicable to the construction of street railways, the municipal authorities have an absolute power to grant or withhold their consent to the construction of street railways and they may impose any conditions however onerous and difficult to perform which seem to them, in the exercise of their discretion, to be proper as the term upon which their consent will be given."

Having the power to impose any conditions which the Common Council saw fit and having the power to require the railroad company to accept such conditions, when the conditions were accepted the grant of the franchise, accompanied by the conditions, became a binding contract between the municipality and the railroad company which was inviolable and which the Legislature had not the power to abrogate, alter or amend.

B. C. R. R. Co. v. B. C. R. Co. 32 Barb. 358.
People v. Sturtevant, 9 N. Y. 273.
Milhau v. Sharp, 27 N. Y. 611, 620.
People v. O'Brien, 111 N. Y. 1

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